

CHAPTER 8

AFFIDAVIT OF SUPPORT

The affidavit of support requirements have become an integral part of immigrant visa processing since the 1996 immigration law¹ significantly tightened the public charge ground of inadmissibility.² The requirements affect all family-based visa applicants, and some employment-based applicants, by imposing burdensome paperwork requirements and other obligations. The law imposes four requirements to establish that an individual is not inadmissible as a public charge:

- The petitioner in all family-based immigrant visa petitions must submit an affidavit of support on Form I-864 or Form I-864EZ;
- The definition of a sponsor excludes anyone who is not a U.S. citizen, national, or lawful permanent resident (LPR), at least 18 years of age, and domiciled in the United States or a U.S. territory or possession;
- The sponsor must evidence “the means to maintain an annual income equal to at least 125 percent of the Federal poverty line,”³ and
- The sponsor must agree to “provide support to maintain the sponsored alien at an annual income that is not less than 125 percent of the Federal poverty income line,” reimburse any federal or state agency that provides a means-tested benefit to the sponsored alien, agree “to submit to the jurisdiction of any Federal or State court” for enforcement of the affidavit, and inform U.S. Citizenship and Immigration Services (USCIS) of any change of address.⁴

The affidavit of support requirements attempt to simplify the process of establishing financial eligibility by establishing an alternate three-step process for satisfying the income requirements. The first step is for the Form I-130 petitioner (who automatically becomes a sponsor) to demonstrate that he or she has sufficient household income, using the standards set forth below. If the sponsor is unable to satisfy the financial requirement through proof of income, he or she may proceed to steps two or three. Step two allows the sponsor to satisfy the financial requirement by counting certain assets belonging to the sponsor, the sponsored immigrant, or other household members. If the sponsor cannot demonstrate sufficient income or assets, the third step is securing a joint sponsor (cosponsor) who can satisfy the financial requirements.

This chapter will provide an analysis of the affidavit of support requirements and Form I-864, Affidavit of Support Under Section 213A of the Act; Form I-864A, Con-

¹ Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Pub. L. No. 104-208, div. C, 110 Stat. 3009, 3009-546 to 3009-724.

² IIRAIRA §551, 110 Stat. 3009-675 to 3009-680, codified in Immigration and Nationality Act (INA) §§212(a)(4), 213A.

³ INA §213A(f)(1)(E).

⁴ INA §213A(a)(1).

tract Between Sponsor and Household Member; and Form I-864W, Intending Immigrant's Affidavit of Support Exemption. Form I-864EZ, Affidavit of Support Under Section 213A of the Act, may be used in lieu of the longer Form I-864 when the sponsor is petitioning for only one family member, is employed (not self-employed), will satisfy the financial requirements with income (not assets), and will be using only his or her income (not using other household members' or joint sponsors' income) to satisfy the financial requirements. Every reference to the Form I-864 in this chapter should be considered to include the alternative Form I-864EZ where appropriate.

Mandatory Filing Requirement

Who Is Affected

The statute requires almost all family-based visa applicants to submit the Form I-864 affidavit of support as a condition of admissibility.⁵ Employment-based immigrant visa applicants are required to submit an affidavit if the applicant's relative either filed the Form I-140, Immigrant Petition for Alien Worker, or has a significant (5 percent) ownership interest in the business entity that filed the petition.⁶

For family-based petitions, the affidavit requirement affects intending immigrants who "seek admission or adjustment of status under a visa number issued under section 201(b)(2) or 203(a)" of the Immigration and Nationality Act (INA). These two sections define eligibility for a family-based visa by categorizing the applicant as either an "immediate relative" of the petitioner or as fitting within one of the four "preference" categories.

The process for immigrating a family member is initiated by the U.S. citizen's or LPR's completing and filing a Form I-130, Petition for Alien Relative. At the time the intending immigrant files for either adjustment of status or an immigrant visa, the petitioner named on the Form I-130 must execute and file an affidavit of support. The term "intending immigrant" is defined in the final regulation as "any beneficiary of an immigrant visa petition filed under section 204 of the [INA], including any alien who will accompany or follow-to-join the principal beneficiary."⁷ In other words, the petitioner must submit an affidavit of support for the principal beneficiary designated on the I-130 petition, as well as for the beneficiary's family members who will be immigrating under the same immigrant visa category. If the principal beneficiary is immigrating through one of the preference categories, his or her spouse and children may be granted an immigrant visa also. That derivative family member could be applying at the same time or within six months of the principal beneficiary (accompanying) or more than six months later (following-to-join).

⁵ INA §212(a)(4)(C)(ii).

⁶ INA §§212(a)(4)(D), 213A(f)(4)(A).

⁷ 8 Code of Federal Regulations (CFR) §213a.1.

If the petitioner cannot demonstrate sufficient income or assets, as described below, then the petitioner has the right to obtain a joint sponsor who does satisfy the income requirements and agrees to be jointly and severally liable with the petitioner.

Who Is Not Affected

The affidavit of support is only required for persons seeking a family-based (and in limited circumstances an employment-based) immigrant visa. Therefore, the following immigrant visa applicants are *not* affected by the affidavit of support requirement:

- Applicants under the Cuban Adjustment Act;
- Applicants under the Nicaraguan Adjustment and Central American Relief Act;
- Applicants under the Haitian Refugee Immigration Fairness Act;
- Special immigrant juveniles;
- Diversity visa lottery applicants;
- Persons granted asylum or refugee status;
- Registry applicants; and
- Persons adjusting based on being granted cancellation of removal, or suspension of deportation.

The regulations also specify that the affidavit of support requirement does not apply to widows and widowers applying for immigrant status based on prior marriage to a U.S. citizen.⁸ Nor does it apply to battered spouses and children filing self-petitions based on a relationship to a U.S. citizen or LPR spouse or parent who was responsible for the battery or extreme cruelty.⁹ These applicants, however, must submit a Form I-864W, Intending Immigrant's Affidavit of Support Exemption.¹⁰ The affidavit of support requirement does not apply to nonimmigrant visa applicants, such as those seeking a K or V visa. Fiancé(e)s who enter the United States on a K-1 visa and then marry the U.S. citizen petitioner within 90 days are allowed to file directly for adjustment of status.¹¹ They must submit an I-864 at the time they file for LPR status.¹²

There is an important exemption for intending immigrants who already have acquired 40 "qualifying quarters."¹³ A qualifying quarter is a legal term relating to a unit of wage that, if earned in most types of employment, counts toward coverage for Social Security benefits. One *earns* up to four qualifying quarters in a calendar year. But the spouse and child may also be *credited* with the quarters earned by the spouse

⁸ 8 CFR §213a.2(a)(2)(ii)(A).

⁹ *Id.*

¹⁰ 8 CFR §213a.2(a)(1)(i)(B).

¹¹ INA §245(d).

¹² 8 CFR §§213a.2(a)(2)(i)(A), (b)(1).

¹³ INA §213A(a)(3)(B).

or parent: spouses may be credited with all the quarters earned by the other spouse during marriage, assuming the marriage did not end in divorce; children may be credited with all quarters earned by either or both parents until the child turns 18. Because the affidavit of support requirements terminate when the sponsored immigrant earns or is credited with 40 qualifying quarters, intending immigrants who demonstrate through Social Security earnings statements that they have already satisfied that requirement do not have to submit an affidavit of support. Instead, they submit a Form I-864W and include a copy of the wage earner's Social Security earnings record.

An exemption also applies for children who will be deriving citizenship status pursuant to the Child Citizenship Act of 2000 immediately upon immigrating or adjusting status because they are under 18 and residing with at least one U.S. citizen parent.¹⁴ These children will submit the Form I-864W in lieu of the affidavit of support.

When Must the Affidavit Be Filed

The affidavit must be filed at the time an intending immigrant is applying for an immigrant visa or adjustment of status.¹⁵ Because all family-based adjustment applications are now filed with the National Benefits Center (NBC) via the Chicago lock-box, the Form I-864 must be submitted together with the Form I-485 and accompanying documents. Legacy Immigration and Naturalization Service (INS) stated in a 2000 policy memorandum that the affidavit of support must be legally sufficient at the time the adjustment of status application was approved, not at the time the affidavit was filed.¹⁶ That policy allowed adjustment applicants to submit an affidavit of support showing income below the required level, provided they supplemented it at the adjustment interview showing proof of sufficient income. USCIS, however, has reversed its position on this issue, and has now determined that the affidavit must be sufficient both at the time of filing and at the time the adjustment application is adjudicated.¹⁷ The NBC is following that policy when it vets the affidavit of support as part of the process of preparing the adjustment application for adjudication. Beginning November 23, 2005, all adjustment applications must be filed centrally and must include the Form I-864.¹⁸ If processing at a U.S. consular office, the applicant must submit the Form I-864 either to the National Visa Center or the consulate as part of the instruction package processing.

¹⁴ 8 CFR §213a.2(a)(2)(ii)(E).

¹⁵ 8 CFR §213a.2(a)(1)(ii).

¹⁶ INS Memorandum, M. Cronin, "Clarification of Service Policy Concerning I-864 Affidavit of Support" (Mar. 7, 2000), *published on* AILA InfoNet at Doc. No. 00032704 (*posted* Mar. 27, 2000).

¹⁷ USCIS Memorandum, M. Aytes, "Consolidation of Policy Regarding USCIS Form I-864, Affidavit of Support (AFM Update AD06-20)" (June 27, 2006), *published on* AILA InfoNet at Doc. No. 06063013 (*posted* June 30, 2006).

¹⁸ USCIS Memorandum, M. Aytes, "USCIS Policy Regarding Form I-864, Affidavit of Support" (Nov. 23, 2005), *published on* AILA InfoNet at Doc. No. 05120210 (*posted* Dec. 2, 2005).

Definition of Sponsor

According to the statute, to qualify as a sponsor, one must satisfy three basic eligibility requirements. A sponsor must be:

- A U.S. citizen, national, or LPR;
- At least 18 years of age; and
- Domiciled within the United States or in any U.S. territory or possession.¹⁹

There are no exceptions to these requirements. Although a petitioner who is unable to satisfy the income requirements can obtain a joint sponsor who can satisfy them, this is not true for the citizenship/immigration status, age, and domicile requirements. Every sponsor and joint sponsor must satisfy these basic prerequisites.

Citizen, National, or Lawful Permanent Resident

Because the sponsor must be a citizen, national, or LPR, the sponsor must be a natural person, and cannot be a corporation or other entity. Joint sponsors or relatives in employment-based petitions who are LPRs must submit proof of that status with the I-864 form.

The citizen/LPR requirement will not affect those family-based petitioners who can satisfy the income requirements; to sponsor a family member for immigration, the petitioner must be a citizen or LPR. However, for those petitioners who must obtain a joint sponsor, this requirement may serve to reduce the potential pool further. For example, nonimmigrants cannot serve as joint sponsors.

Domiciled in the United States

The sponsor must be domiciled in “any of the several States of the United States, the District of Columbia, or any territory or possession of the United States.”²⁰ This requirement could prevent some U.S. citizens or LPRs residing outside the United States from filing a visa petition on behalf of another family member. To overcome this hurdle, it is important to read closely the definition of “domicile” and “residence,” as well as the exceptions set forth in the interim regulation.

A domicile is defined as “the place where a sponsor has his or her principal residence, as defined in section 101(a)(33) of the [INA], with the intention to maintain that residence for the foreseeable future.”²¹ Residence, in turn, is defined as the person’s “place of general abode,” or the “principal, actual dwelling place in fact, without regard to intent.”²² Taken together, this means that sponsors residing temporarily outside the United States can still qualify to submit an I-864, provided they have a residence in the United States that they use as their “principal, actual dwelling place.”

¹⁹ INA §213A(f)(1).

²⁰ INA §213A(f)(1)(C).

²¹ 8 CFR §213a.1.

²² INA §101(a)(33).

The term “United States” includes Puerto Rico, Guam, and the Virgin Islands.²³ The terms “territory” or “possession” are not specifically defined in the INA, but the term “outlying possession” is defined to include only American Samoa and the Swains Island.²⁴ In addition, the Northern Mariana Islands should be considered a territory or possession.

LPRs living abroad temporarily will be considered domiciled in the United States if they apply for and obtain the “preservation of residence” benefit set forth in INA §§316(b) or 317.²⁵ Section 316(b) relates to LPRs who have been present in the United States for at least one year after being admitted for permanent residence, but who contemplate being outside the United States for more than one year. To qualify for this benefit, the LPR must be employed or under contract with any of the following:

- The U.S. government;
- An American institution of research recognized by the U.S. attorney general;
- An American firm or corporation engaged in whole or in part in the development of foreign trade and commerce of the United States;
- A subsidiary of the above firm or corporation, more than 50 percent of whose stock is owned by an American firm or corporation; or
- A public international organization of which the United States is a member by treaty or statute and by which the person was not employed until after being an LPR.

In addition, the LPR must establish that the absence from the United States is on behalf of the employer and for the purpose set forth in the employment.

INA §317 relates to persons who are authorized to perform the ministerial or priestly functions of a religious denomination having a bona fide organization within the United States. Alternatively, they could be engaged as a missionary, brother, nun, or sister by a religious denomination or by an interdenominational mission organization having a bona fide organization within the United States. To qualify for this exception, the LPR must have been physically present and residing in the United States for at least one year prior to engaging in the above activities abroad, and their absence must have been for the purpose of performing these activities.

A citizen living abroad temporarily also may be considered domiciled in the United States if the person’s employment meets requirements similar to those set forth above.²⁶ To qualify, the employment must be with one of the following:²⁷

- The U.S. government;

²³ INA §101(a)(38).

²⁴ INA §101(a)(29).

²⁵ 8 CFR §213a.2(c)(1)(ii)(A).

²⁶ *Id.*

²⁷ INA §319(b)(1).

- An American institution of research recognized by the U.S. attorney general;
- An American firm or corporation engaged in whole or in part in the development of foreign trade and commerce of the United States;
- A subsidiary of the above firm or corporation; or
- A public international organization of which the United States participates by treaty or statute.

Alternatively, the citizen may be:²⁸

- Authorized to perform the ministerial or priestly functions of a religious denomination having a bona fide organization within the United States; or
- Engaged solely as a missionary by a religious denomination or by an interdenominational mission organization having a bona fide organization within the United States.

If the citizen's or LPR's employment does not fall within the above exceptions, he or she will have to return to the United States and establish a domicile in this country before being able to qualify as a sponsor. Sponsors who are domiciled abroad nevertheless may submit an affidavit of support if they convince USCIS or the consular official that they will re-establish domicile in the United States on or before the date the intending immigrant obtains LPR status.²⁹ Sponsors who are U.S. citizens and who are accompanying the intending immigrant to the port of entry will be deemed to have established domicile in the United States; sponsors who are LPRs will also be so deemed unless the LPR is denied admission to the country.³⁰

Consequences of Petitioner's Dying

Legislation enacted at the end of 2009 allows certain surviving family members who were residing in the United States at the time the petitioner died and who continue to reside here to have their pending I-130 petition or adjustment application adjudicated as if the petitioner were still alive.³¹ If the petition was previously approved, it will not be subject to automatic revocation upon the death of the petitioner. In addition, regulations pre-dating this statutory change provide relief for those who do not meet these residency requirements. The beneficiary may request that USCIS reinstate a petition that was automatically revoked upon the petitioner's death if such revocation would be "inappropriate" based on humanitarian grounds.³² This form of relief, referred to as humanitarian reinstatement, would be available to those benefi-

²⁸ *Id.*

²⁹ 8 CFR §213a.2(c)(1)(ii)(B).

³⁰ *Id.*

³¹ FY10 DHS Appropriations Act, Pub. L. No. 111-83, 123 Stat. 2142, §568(d), October, 28, 2009, adding INA §204(l).

³² 8 CFR §205.1(a)(3)(i)(C).

ciaries residing abroad or residing there at the time the petitioner died, while the new statutory benefit would apply to those residing here.

In both situations, however, the beneficiary must submit a substitute affidavit of support from another close relative. Family members of the intending immigrant who can act as substitute sponsors include the spouse, parent, mother-in-law, father-in-law, sibling, child (at least 18 years old), son, daughter, son-in-law, daughter-in-law, sister-in-law, brother-in-law, grandparent, grandchild, or legal guardian.³³ Someone who is filing as a substitute sponsor should check box 1f in Part 1 of the Form I-864 and submit proof of the relationship to the intending immigrant.

Legally Enforceable Contract

The statute provides that the affidavit will be legally enforceable against the sponsor in actions brought by either the sponsored immigrant or a federal, state, or “other entity” that provides a means-tested benefit to the alien.³⁴ In other words, the sponsored immigrant can sue the sponsor to enforce the maintenance agreement. In addition, should the immigrant ever obtain a means-tested benefit, the agency or entity that provided it can also seek reimbursement from the sponsor.

Enforceable by the Sponsored Immigrant

After adjustment of status or admission to the United States as an LPR, the sponsored immigrant can require the sponsor to maintain him or her at “an annual income that is not less than 125 percent of the Federal poverty line.”³⁵ Even persons on active duty in the U.S. armed forces, who must only demonstrate the means to maintain an annual income equal to 100 percent of the poverty line,³⁶ must agree to maintain the sponsored immigrant at this level. It has been interpreted to mean that the sponsor must provide support equivalent to 125 percent of the poverty line for a family of one.³⁷ Based on the 2012 federal poverty guidelines,³⁸ this amounts to \$13,962.

Where the sponsor executed affidavits of support for other family members who accompanied the principal beneficiary, it is also unclear whether the sponsor must maintain each immigrant at the \$13,962 level (based on the 2012 guidelines) or whether he or she can add them together and apply the household formula. In other words, where the person sponsored a total of four immigrants, must the sponsor maintain each immigrant at the \$13,962 level (for a total of \$55,848) or may the sponsor satisfy the requirement by maintaining them collectively at the 125 percent level for a household of four (\$28,812, based on 2012 guidelines)? Until the courts or

³³ INA §213A(f)(5)(B).

³⁴ INA §213A(e).

³⁵ INA §213A(a)(1)(A).

³⁶ INA §213A(f)(3).

³⁷ *Stump v. Stump*, 2005 U.S. Dist. LEXIS 26022 (N.D. Ind. Oct. 25, 2005).

³⁸ See discussion later in this chapter.

USCIS provides clarification, we should assume that the sponsor is obligated to maintain each sponsored immigrant at the \$13,962 level.

The sponsor can provide either cash or in-kind benefits. The sponsor should be able to satisfy the maintenance requirement by providing housing, food, or clothes in lieu of cash. Also, the sponsor should be able to reduce the amount of support by any income or benefits the sponsored immigrant is receiving from other sources. For example, if the sponsored immigrant is working and earning an annual income of \$5,000, the sponsor must only provide, based on the 2012 guidelines, maintenance equivalent to \$8,962.

It appears that the sponsored alien bears no affirmative duty to mitigate damages, although only two courts have addressed this issue. The first case found that the sponsored alien had sought employment to mitigate damages, though the court failed to hold that the plaintiff had a duty to do so.³⁹ The second case held that the sponsored alien has no burden to mitigate damages.⁴⁰ The court refused to read into the law a requirement that the sponsored alien be actively seeking employment. The court found that the goal of the statute was to prevent the admission of aliens who might become public charges in the future. This goal was best served, according to the court, by not imposing additional burdens on the sponsored alien. Instead, by making the obligation air-tight, it might force sponsors to be more prudent before entering into these contracts.

When there is a sponsor and a joint sponsor, they each accept joint and several liability to maintain the sponsored immigrant at the 125 percent of poverty level.⁴¹ For example, in 2012 the sponsor and joint sponsor must collectively ensure that the sponsored immigrant is receiving a minimum of \$13,962. The sponsored immigrant can elect to enforce the affidavit agreement against either the sponsor or the joint sponsor. However, he or she can collect a judgment only up to 125 percent of the poverty line.

Enforceable by a Federal, State, or Other Entity

If the sponsored immigrant receives a means-tested benefit, the agency or entity that provided it may seek reimbursement from the sponsor. This means that should the immigrant suffer a debilitating injury or illness, the sponsor could be required to reimburse the full amount of any means-tested medical, cash, or in-kind benefits paid by the government agency or entity.

The term “federal means-tested program” has been defined to include only five programs: Supplemental Security Income (SSI), Medicaid, Temporary Assistance to Needy Families (TANF), Food Stamps, and the State Children’s Health Insurance Pro-

³⁹ *Stump v. Stump*, 2005 U.S. Dist. LEXIS 26022 (N.D. Ind. Oct. 25, 2005).

⁴⁰ *Liu v. Mund*, No. 11-1453 (7th Cir. July 12, 2012).

⁴¹ 8 CFR §213a.1.

gram (SCHIP).⁴² Each state is encouraged to identify all state programs that satisfy the definition of means-tested, and to issue public notices of those determinations.⁴³ In any event, certain federal means-tested programs, such as emergency Medicaid and school loans and grants, are exempt from the sponsor reimbursement requirement.⁴⁴

It is unlikely that a sponsored immigrant will qualify for many means-tested benefit programs during the contract period. This is because in most states they will be barred from receiving these programs for five years, beginning on the date they obtain LPR status.⁴⁵

After the five-year bar, sponsor-to-alien deeming of income may still impede most immigrants from qualifying for means-tested programs. This means that the income of the sponsor, as well as of the sponsor's spouse, will be "deemed" to belong to the sponsored immigrant, thus making the applicant financially ineligible for the benefit program.⁴⁶ They could still be eligible, nevertheless, in three situations: (1) where the sponsor's and immigrant's combined incomes are low enough to satisfy financial eligibility guidelines; (2) where the sponsor is not providing any income and the immigrant would otherwise go without food or shelter; or (3) where the immigrant spouse or child has been the victim of battery or extreme cruelty.⁴⁷

Enforcement in General

The affidavit of support is a contract between the sponsor and the federal government. The intended beneficiaries are the sponsored immigrant and any federal, state, or local government agency or private entity that provides a means-tested benefit to the sponsored immigrant. Any of the intended beneficiaries may bring a civil action to enforce the contract in the appropriate court.⁴⁸ By signing the Form I-864, the sponsor also agrees to submit to the personal jurisdiction of any federal or state court in a suit brought by such agency or entity.⁴⁹

Any agency or entity seeking reimbursement for a means-tested benefit provided to the sponsored immigrant must notify the sponsor of the amount owed,⁵⁰ which can be the "unreimbursed costs" of such a benefit.⁵¹ For example, if the sponsored immigrant has received SSI benefits, based on age or disability, the federal government

⁴² 64 Fed. Reg. 28675, 28679–80 (May 26, 1999).

⁴³ 8 CFR §213a.4(b).

⁴⁴ Instructions to Form I-864, pt. 8.

⁴⁵ 8 USC §1613.

⁴⁶ 8 USC §1631(a).

⁴⁷ 8 USC §§1631(e), (f).

⁴⁸ INA §213A(e).

⁴⁹ Form I-864, pt. 8, no. 30(d).

⁵⁰ 8 CFR §213a.4(a)(1).

⁵¹ INA §213A(b)(1)(A).

can request that the sponsor reimburse the full amount of the monthly benefit. If Medicaid covered a sponsored immigrant's hospital or physician's indebtedness, both the state and the federal government can seek reimbursement for their respective share of the costs.

The request must be in writing and be served on the sponsor by personal service.⁵² The request must include all of the following:

- The date the support obligation commenced (*i.e.*, the date the sponsored immigrant became a permanent resident);
- The sponsored immigrant's name, alien registration number, address, and date of birth;
- The type of means-tested public benefit the sponsored immigrant received;
- The dates the immigrant received the benefit; and
- The total amount of benefits received.⁵³

The agency or entity may aggregate all the benefit payments made to the immigrant to date into one request.⁵⁴ The notice must give the sponsor the option of either paying the amount requested or entering into a payment schedule.⁵⁵ The agency or entity must wait 45 days after it issues the written request before filing a lawsuit to enforce the contract.⁵⁶

If the sponsor fails to respond within 45 days to the request for reimbursement, or fails to indicate a willingness to make reimbursement, the entity may initiate an action to enforce the affidavit of support.⁵⁷ If the sponsor elects to enter into a repayment plan but later defaults on payments, the entity may bring an enforcement action.⁵⁸ The entity has 10 years after the benefit was provided to commence an enforcement action pursuant to the sponsorship agreement.⁵⁹

An entity pursuing enforcement of the affidavit may elect to use a collection agency or other person to act on its behalf in collecting the amount owed.⁶⁰ If the entity obtains a judgment, it may pursue all available remedies to collect and enforce the judgment, as well as recover attorneys' fees and other costs.⁶¹ These potential

⁵² 8 CFR §213a.4(a)(1)(i).

⁵³ 8 CFR §213a.4(a)(1)(ii).

⁵⁴ 8 CFR §213a.4(a)(1)(iii).

⁵⁵ 8 CFR §213a.4(a)(1)(iv).

⁵⁶ 8 CFR §213a.4(a)(1)(v).

⁵⁷ INA §213A(b)(2)(A); 8 CFR §213a.4(a)(1)(v).

⁵⁸ INA §213A(b)(2)(B).

⁵⁹ INA §213A(b)(2)(C).

⁶⁰ INA §213A(b)(3).

⁶¹ INA §213A(c).

enforcement efforts include garnishment, writ of execution, judgment lien, and judicial installment payment order.⁶²

If the sponsored immigrant is seeking enforcement of the affidavit, he or she is not bound by the above notice requirements. The immigrant can bring an action in state or federal court without having to make a formal request for financial support or having to wait the equivalent 45 days.⁶³ It is also unclear whether the 10-year statute of limitations applies to actions brought by the sponsored immigrant and, if so, what event triggers the running of the statute.

If the sponsored immigrant or the agency or entity that provided the means-tested benefit obtains a final civil judgment against the sponsor, they may send a certified copy of the judgment, along with a reference to “Civil Judgments for Congressional Reports under Section 213A(i)(3) of the Act” to USCIS’s Office of Program and Regulation Development.⁶⁴

Legally Enforceable

Although Congress has stated that the affidavit of support form is legally enforceable, that does not make it so. At least three courts held that legacy INS’s long-standing affidavit of support, the Form I-134, was unenforceable against the sponsor in actions brought by the sponsored immigrant or the states to recover benefits paid to the alien.⁶⁵

Even though the sponsor who executed the I-134 affidavit promised to be “willing and able to receive, maintain and support” the alien, and to “guarantee that [the alien] will not become a public charge,” the courts held that that affidavit of support did not form a legal contract, but represented only a moral obligation. They based this on the wording of the affidavit, the lack of intention by the affiant to be contractually bound, and the fact that the affidavit was only one form of evidence consular and INS agents considered in determining whether an alien was likely to become a public charge.

Several lower courts have upheld the enforceability of the newer Form I-864,⁶⁶ but it is still possible that it could be found to be unenforceable, since so many of the key contractual terms are undefined. These terms include the duration of the liability, which could extend into perpetuity; the amount of any potential financial liability;

⁶² *Id.*

⁶³ 8 CFR §213a.4(a)(2).

⁶⁴ 8 CFR §§213a.4(c)(1), (3).

⁶⁵ See, e.g., *Dept. of Mental Hygiene v. Renal*, 6 N.Y.2d 791 (1959); *State v. Binder*, 356 Mich. 73 (1959); *County of San Diego v. Vilorio*, 276 Cal. App. 2d 350, 80 Cal. Rptr. 869 (1969).

⁶⁶ *Cheshire v. Cheshire*, No. 3:05-cv-00453-TJC-MCR, 2006 U.S. Dist. LEXIS 26602 (M.D. Fla. 2006); *Stump v. Stump*, 2005 U.S. Dist. LEXIS 26022 (N.D. Ind. Oct. 25, 2005); *Schwartz v. Schwartz*, No. CIV-04-770-M, 2005 WL 1242171 (W.D. Okla. 2005); *Tornheim v. Kohn*, No. 00 CV 5084(SJ), 2002 WL 482534 (E.D.N.Y. 2002); *Davis v. Davis*, No. WD-04-020, 2004 WL 2924344 (Ohio Ct. App. 2004).

and the factors that could cause liability, which will largely be determined by future events beyond the control of the affiant.

While the affidavit describes the benefit the sponsor is receiving in return for executing the form (*i.e.*, allowing the visa applicant to overcome the public charge ground of inadmissibility and thus immigrate), sponsors, especially non-relative co-sponsors, still may be able to claim a lack of consideration as a defense to future enforcement. Impossibility to perform will certainly be another common defense. Also, expect sponsors still to claim a lack of understanding of their legal liability at the time they executed the affidavit.

All household members who are party to the Form I-864A, Contract Between Sponsor and Household Member, must agree to be jointly and severally liable for any reimbursement obligation that the sponsor may incur. They are also jointly and severally liable on a claim brought by either the sponsored immigrant or any agency or entity that provides a means-tested program to the sponsored immigrant. They must submit to the personal jurisdiction of any court hearing the matter. The sponsor may commence a legal action against any of the household members to enforce the I-864A, as may the sponsored immigrant and any agency or entity that provides a means-test benefit program to the sponsored immigrant.⁶⁷

Signing the Form I-864A does not make the person a “sponsor” in the legal sense of that word. In other words, these other household members should not have to meet the domicile or citizenship/permanent residency requirements, nor do they have to file change of address forms with USCIS.⁶⁸

Statutory Requirements for Completing the Form

Satisfying the Minimum Income Requirement

The statute mandates that the sponsor demonstrate the means to maintain an annual income equal to at least 125 percent of the federal poverty income line.⁶⁹ Petitioners who are active duty members of the U.S. armed forces and who are petitioning for their spouse or child must only demonstrate that they have an annual income equal to at least 100 percent of the poverty line.⁷⁰

Determining Federal Poverty Line

The federal poverty income line is established by the Office of Management and Budget and is published in guidelines updated each year by the Department of Health and Human Services.⁷¹ The amount of income necessary to be above the poverty in-

⁶⁷ 8 CFR §213a.2(c)(2)(i)(C)(2); Form I-864A, p. 3.

⁶⁸ 8 CFR §213a.2(c)(2)(i)(C)(1).

⁶⁹ INA §213A(f)(1)(E).

⁷⁰ INA §213A(f)(3).

⁷¹ See INA §213A(h); 42 USC §9902(2); 8 CFR §213a.1 (definition of federal poverty line).

come line depends on where the sponsor resides (either in any of the 48 contiguous states, in Alaska, or in Hawaii) and the size of the sponsor's family. The poverty income guidelines for 2012, for example, were published on February 9, 2012, and became effective on March 1, 2012.⁷² Those guidelines, and the corresponding levels for 125 percent of the poverty line, are included as Appendix 8.

Determining Family Unit Size

The key to applying the federal poverty income guidelines and satisfying the 125 percent rule is knowing which household members or dependents must be counted in determining family unit size and whose income can be included. Obviously, the more household members who must be counted, the higher the income that must be demonstrated; the more household members' income that can be included, the easier to satisfy the financial means requirement.

The statute offers basic guidance in determining the size of the family unit. It defines family unit to include the sponsor, the sponsor's household members (both family and non-family dependents), and "other dependents and aliens sponsored by that sponsor" who may not be part of the household.⁷³

The final rule clarifies that the family unit size includes the following persons, regardless of their residence:

- Sponsor;
- Sponsor's spouse;
- Sponsor's unmarried children under 21, unless they are emancipated;
- Persons whom the sponsor has claimed as a dependent on the most recent federal income tax return;
- The intending immigrant and all accompanying, derivative family members; and
- Aliens who have obtained LPR status based on the sponsor's having filed an I-864, assuming the contractual obligations have not terminated.⁷⁴

In addition, the sponsor *may* include other "relatives" residing with the sponsor if it is advantageous to include their income, as explained below. The term "relative" is defined to include only the sponsor's spouse, child, adult son/daughter, parent, or sibling.⁷⁵

Counting Income

In determining the amount of household income that can be considered in satisfying the 125 percent requirement, the regulation allows the inclusion of income from

⁷² 77 Fed. Reg. 4034 (Feb. 9, 2012).

⁷³ INA §213A(f)(6)(A)(iii).

⁷⁴ 8 CFR §213a.1 (definition of household size).

⁷⁵ 8 CFR §213a.1 (definition of relative).

the sponsor's spouse and of any other person included in determining the sponsor's household size.⁷⁶ In order to count the income of any of these household members, the person must be at least 18 years old and, except for the intending immigrant, execute a Form I-864A.⁷⁷ If the household member is not the intending immigrant but is the sponsor's parent, sibling, or son/daughter (other than claimed dependent), he or she must submit proof of that relationship and current residence with the sponsor.⁷⁸

None of these household members, however, need have been residing with the sponsor for the last six months, which was required in the interim regulation. If the household member is the intending immigrant, other than the sponsor's spouse or claimed dependent, and signs a Form I-864A, that person also must submit proof of current residence. If the household member is the sponsor's spouse, there is no requirement that he or she be residing with the sponsor or submit proof of relationship.

Household members who execute Form I-864A do not have to be U.S. citizens, nationals, or LPRs⁷⁹—nor is there any specific requirement that they be residing in the United States with lawful immigration status, even though USCIS may impose such a requirement. The Form I-864A only requires that the household member provide a Social Security number if he or she has one. However, he or she must provide the prior year's tax return.

The final regulation clarifies that the intending immigrant does not need to execute a Form I-864A unless he or she has a derivative spouse or child who will be immigrating “with the intending immigrant.”⁸⁰ In that situation, the intending immigrant needs to execute an I-864A affidavit to ensure that his or her income may be relied upon to support the derivative family member(s).

To count the intending immigrant's income, he or she must either be residing with the sponsor or be the sponsor's spouse or claimed dependent. But in all circumstances the intending immigrant's income must be derived from “lawful employment in the United States or from some other lawful source that will continue to be available to the intending immigrant after he or she acquires permanent resident status.”⁸¹ The latest USCIS memorandum clarifies that it means “authorized employment,” or that performed while the worker had an employment authorization document.⁸²

⁷⁶ 8 CFR §213a.2(c)(2)(i)(C)(1).

⁷⁷ 8 CFR §§213a.2(c)(2)(i)(C)(1), (3).

⁷⁸ 8 CFR §§213a.1 (definition of household size), 213a.2(c)(2)(i)(C)(5).

⁷⁹ 8 CFR §213a.2(c)(2)(i)(C)(1).

⁸⁰ 8 CFR §213a.2(c)(2)(i)(C)(3). The instructions to the Form I-864, as well as question 24e, indicate that the intending immigrant does not have to execute a Form I-864A unless he or she has “accompanying” dependents, which would mean immigrating at the same time or within six months of the intending immigrant.

⁸¹ 8 CFR §213a.1 (definition of household income).

⁸² INS Memorandum, M. Cronin, “Clarification of Service Policy Concerning I-864 Affidavit of Support” (Mar. 7, 2000).

This means that most intending immigrants who are residing abroad will be precluded from counting their income as part of the sponsor's total household income, because they will likely be changing employment once they immigrate. The final regulation specifies that offers of employment are not sufficient to meet the intending immigrant's burden of showing continuing employment.⁸³ This is perhaps the most controversial provision in the final regulations.

Applying the Income Test

One of the most significant changes with the final rule is the emphasis now placed on *current* income versus that reported on prior tax returns. The step-by-step instructions to the Form I-864 explain that the sponsor is to enter his or her "current individual earned or retirement annual income."⁸⁴ In most cases, this will be "expected income for the current year."⁸⁵ If the sponsor will be relying on the income of the intending immigrant or other household members, it is their current income that will be listed on the Form I-864 and I-864A. The final rule stresses that it is this "reasonably expected household income" that shall be given the "greatest evidentiary weight."⁸⁶ Tax returns or other documentation merely will serve as evidence of the likelihood that the sponsor will be able to maintain this income in the future.

The sponsor does not have to be employed. The Form I-864 requires the sponsor to state whether he or she is employed, self-employed, retired, or unemployed.⁸⁷ Income could come from any source, including pensions, interest income and dividends, alimony, or child support.⁸⁸

Question 25 on the Form I-864 requires the sponsor to check a box indicating that he or she has filed a tax return for each of the three most recent tax years and is attaching a photocopy or transcript of the most recent return, and, optionally, a box indicating that he or she is voluntarily attaching photocopies of the tax returns for the second and third most recent tax years. This reflects the latest policy memos from USCIS and the Department of State (DOS) that reduced the proof of tax filings to the most recent year rather than the past three years.⁸⁹ Regrettably, there is no comparable box to check if the sponsor did not have a tax liability for any of those three years. If the reason is due to insufficient income, the instructions tell the sponsor to

⁸³ 8 CFR §213a.1 (definition of household income).

⁸⁴ Form I-864, Instructions, pt. 6, no. 23.

⁸⁵ *Id.*

⁸⁶ 8 CFR §213a.2(c)(2)(ii)(C).

⁸⁷ Form I-864, pt. 6, q. 22.

⁸⁸ Form I-864, Instructions, p. 6, no. 23.

⁸⁹ USCIS Memorandum, M. Aytes, "USCIS Policy Regarding Form I-864, Affidavit of Support" (Nov. 23, 2005), *published on* AILA InfoNet at Doc. No. 05120210 (*posted* Dec. 2, 2005); Revised Requirements for Form I-864 Processing, State 051172 (Mar. 6, 2006), *published on* AILA InfoNet at Doc. 06040469 (*posted* Apr. 4, 2006).

“attach a written explanation,”⁹⁰ so presumably he or she would qualify to check the first box.

If the sponsor is exempt from tax filing because of some other reason, he or she must “attach a written explanation including evidence of the exemption and how [he or she is] subject to it.”⁹¹ The sponsor in that case still may submit other evidence of annual income. The sponsor or household member must establish by a preponderance of the evidence that he or she had no duty to file the tax return.⁹² Being exempt from the income tax filing requirement does not exempt the sponsor from the affidavit of support filing requirement.⁹³

The sponsor must list on the Form I-864 the total income for the last three tax years as reported on those tax returns, since the returns will be used as an indication of the sponsor’s ability to maintain that income over time. If estimated current annual income appears significantly higher than past reported income, or if the income varies widely from year to year, it will likely raise suspicions with an adjudicator. In those cases, expect USCIS or consular official to request additional proof, such as pay stubs or an employer’s letter. Otherwise, those employment records need no longer be submitted with the affidavit of support.

The instructions also specify which line from the tax return should be used when reporting “total” income—either gross or adjusted gross—and explain that it is only the federal tax return that must be submitted.⁹⁴ The sponsor or household member should not submit a state or foreign income-tax return unless the person had no federal tax liability and wants to use the return to verify current income.⁹⁵ The sponsor may submit either a plain (uncertified) Internal Revenue Service transcript or a photocopy of the tax return from his or her own records.⁹⁶ Include the W-2, Form 1099, and all other attachments and schedules that were submitted with the federal return.⁹⁷

The sponsor may not count any means-tested benefits (food stamps, SSI, Medicaid, TANF, or SCHIP) as income, but he or she may include retirement benefits,

⁹⁰ Form I-864, Instructions, pt. 6, no. 25. In fact, the preamble to the final regulation implies that the sponsor needs to submit “proof that the income was below the threshold.” 71 Fed. Reg. 35731, 35739 (June 21, 2006). Such proof presumably may include a pay stub or letter from an employer. But if the sponsor was unemployed in the prior year, it is the equivalent of asking him or her to prove a negative. If the agency insists on the submission of proof of insufficient income, the practical effect will be to require sponsors to submit late tax returns evidencing no tax liability. These can be submitted at any time without incurring a penalty.

⁹¹ Form I-864, Instructions, pt. 6, no. 25. *See also* 8 CFR §213a.2(c)(2)(i)(B).

⁹² 8 CFR §213a.2(c)(2)(i)(D).

⁹³ 8 CFR §213a.2(c)(2)(i)(B).

⁹⁴ Form I-864, Instructions, pt. 6, no. 25.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ 8 CFR §213a.2(c)(2)(i)(A).

unemployment compensation, workers' compensation, or other similar benefits.⁹⁸ Earlier policy memos explained that sponsors are able to include both taxable and nontaxable income, such as disability and child support payments, as part of the total household income.⁹⁹ Until USCIS or DOS issues further guidance, proceed as if those interpretations are still in effect.

Every sponsor who executes a Form I-864 and every household member who executes a Form I-864A must submit a copy of their most recent tax return.¹⁰⁰ Many intending immigrants, however, do not need to submit a Form I-864A. It does not appear that the sponsor has to submit the tax return of the intending immigrant if his or her income is being included and he or she did not execute a Form I-864A. In those cases, the sponsor simply includes the intending immigrant's income in section 24b of the Form I-864 as part of total household income. But given that the intending immigrant must either be the sponsor's spouse or be residing with the sponsor, in most situations the intending immigrant either will have filed a joint tax return or be listed as a dependent on the sponsor's return. Bear in mind that the intending immigrant still must submit proof that the "lawful" employment will continue from the same source after he or she obtains LPR status.

What happens when the affidavit of support isn't examined for sufficiency until months or even years after it was submitted? The regulation clarifies that the adjudicating official must consider the sufficiency of the affidavit of support based on the income reported for the year the Form I-864 or Form I-864A was submitted, not on the sponsor's income on the date the application for adjustment of status or an immigrant visa is adjudicated.¹⁰¹ Similarly, adjudicators must use the federal poverty guidelines in effect at the time the affidavit of support is submitted, not at the time it is considered for sufficiency.¹⁰² For that reason, all sponsors must submit Form I-864P, Poverty Guidelines, with the affidavit of support.¹⁰³ If more than one year has passed from the date of submission to the date of adjudication, USCIS or DOS officials may, in the exercise of discretion, request additional evidence, such as income tax returns for the most recent tax year.¹⁰⁴ In those cases, it will be the sponsor's income and poverty guidelines in effect for the year the adjustment or immigrant visa application is adjudicated that will control, not those for the year the affidavit of support was originally submitted.¹⁰⁵

⁹⁸ 71 Fed. Reg. 35731, 35738 (June 21, 2006).

⁹⁹ I-864 Affidavit of Support—Update No. 17: More Q's and A's, State 133584 (July 1998), published on AILA InfoNet at Doc. No. 98081190 (posted Aug. 11, 1998); INS Memorandum, "Additional Guidance #1—Affidavit of Support" (Mar. 12, 1998).

¹⁰⁰ 8 CFR §§213a.2(c)(2)(i)(A), (C)(4).

¹⁰¹ 8 CFR §213a.2(a)(1)(v)(A).

¹⁰² *Id.*

¹⁰³ 8 CFR §213a.2(a)(1)(ii).

¹⁰⁴ 8 CFR §213a.2(a)(1)(v)(B).

¹⁰⁵ *Id.*

All derivative beneficiaries who will accompany (*i.e.*, immigrate at the same time as or within six months of) the principal beneficiary must be included on the Form I-864.¹⁰⁶ Each principal and derivative beneficiary must have a separate affidavit of support filed in his or her case, but accompanying derivatives may submit a photocopy of the one submitted for the principal.¹⁰⁷ They do not need to submit a photocopy of the supporting documentation. The photocopy of the Form I-864 does not need to contain an original signature. Each principal beneficiary (*e.g.*, petitioner's mother and father) must submit a separate affidavit of support bearing an original signature.¹⁰⁸

The I-864, I-864EZ, and I-864A forms do not have to be signed in front of a notary or consular official. The sponsor or household member merely swears under penalty of perjury that the information provided is correct.

Counting Assets

The statute's "flexibility" provision allows for the disclosure of "significant" assets that are "available for the support of the sponsored alien."¹⁰⁹ If the sponsor is unable to show income at or greater than 125 percent of poverty, the sponsor can satisfy the financial means requirement by submitting proof of significant assets.¹¹⁰ These assets can be owned by either the sponsor, other household members who executed Form I-864A, or the intending immigrant.¹¹¹ It is not necessary for the intending immigrant to execute a Form I-864A to count his or her assets.

If the sponsor is a U.S. citizen and the intending immigrant is the sponsor's spouse or child aged 18 years or over, the value of these assets must be at least three times the shortfall between the sponsor's household income and the federal poverty line for the sponsor's household size.¹¹² If the intending immigrant is an orphan to be formally adopted in the United States, the value of the assets must equal only the shortfall between the sponsor's household income and the federal poverty line for the sponsor's household size.¹¹³ In all other situations, the assets must be at least five times the shortfall.¹¹⁴

To qualify as "available," the assets must be "readily converted into cash within one year."¹¹⁵ Examples of such assets include savings in a bank or other financial

¹⁰⁶ 8 CFR §213a.2(a)(1)(iv).

¹⁰⁷ 8 CFR §213a.2(g)(1).

¹⁰⁸ 8 CFR §213a.2(a)(1)(iii).

¹⁰⁹ INA §213A(f)(6)(A)(ii).

¹¹⁰ 8 CFR §213a.2(c)(2)(iii)(A).

¹¹¹ 8 CFR §213a.2(c)(2)(iii)(B).

¹¹² 8 CFR §213a.2(c)(2)(iii)(B)(1).

¹¹³ 8 CFR §213a.2(c)(2)(iii)(B)(2).

¹¹⁴ 8 CFR §213a.2(c)(2)(iii)(B)(3).

¹¹⁵ 9 *Foreign Affairs Manual* (FAM) 40.41 PN2.13.

institution; stocks, bonds, and certificates of deposit; real estate; and personal property.¹¹⁶ The sponsor must submit the appropriate proof of ownership, which could include bank statements, stock certificates, deeds, titles to vehicles, and sales receipts or other proof of purchase.¹¹⁷ The sponsor must include any liens and liabilities relating to the property, and a statement indicating date of acquisition, where the property is located, and the value of each asset.¹¹⁸

If the sponsor is counting a vehicle as an asset, he or she must own more than one, and they must be in working order.¹¹⁹ In estimating the current worth of a vehicle, the “blue book” value should be the standard measurement.

Use of Joint Sponsors

If the petitioner is unable to satisfy the minimum income requirements, through proof of household income or assets, the last option is to obtain a joint sponsor. Failure to satisfy the income test and securing of a joint sponsor does not relieve the petitioner of the obligation of filing a Form I-864. Both the petitioner and the joint sponsor will be executing a Form I-864 and each will be fully liable for maintaining the sponsored immigrant and for means-tested benefits he or she obtains.

Every intending immigrant—whether a principal beneficiary or derivative—may have only one joint sponsor.¹²⁰ But in family-based preference category cases comprised of a principal beneficiary and at least one accompanying derivative, the sponsor may use up to two joint sponsors.¹²¹ The sponsor may apportion the financial burden between the two joint sponsors, so that, for example, one joint sponsor bears responsibility for the principal beneficiary and the second joint sponsor bears responsibility for the derivative. In that situation, the first joint sponsor would include the principal beneficiary as a household member and would bear the financial responsibility for that person, while the second joint sponsor would include the derivative.¹²² Each joint sponsor would identify on the Form I-864 the intending immigrant(s) that he or she is sponsoring.

Each joint sponsor must execute a separate Form I-864 and satisfy the income requirements independently. In other words, the petitioner and/or cosponsor(s) may not pool their income to arrive at a total that satisfies the 125 percent of poverty requirement.

The statutory “flexibility” provision also applies to joint sponsors, allowing them to submit proof of significant assets if their income is insufficient. The joint sponsor

¹¹⁶ 8 CFR §213a.2(c)(2)(iii)(B).

¹¹⁷ See 9 FAM 40.41 N5.4-1.

¹¹⁸ *Id.*

¹¹⁹ Form I-864 Instructions, p. 3.

¹²⁰ 8 CFR §213a.2(c)(2)(iii)(C).

¹²¹ *Id.*

¹²² *Id.*

may combine his or her assets with that of the intending immigrant, and combine his or her income and assets to that of household members who execute the I-864A.¹²³

USCIS and State Department Discretion

USCIS and consular officials maintain a fair amount of discretion in determining whether the affidavit will be sufficient. The most important factors will be current job status and earnings from current and past employment, as reflected on the three most recent tax returns. Legacy INS stated that “in most instances, sponsors will be found eligible if they are employed and demonstrate the ability, along with household members who sign a contract on Form I-864A, to earn income at or above 125 percent of the poverty line for the number of persons who will be supported.”¹²⁴ In most cases the sponsor will need to be employed, unless the sponsor’s income from sources other than employment, the sponsor’s assets, or the income/assets from other household members who execute the Form I-864A are sufficient. Current use of welfare benefits by a sponsor or one of the sponsor’s family members or dependents certainly will be a negative factor.

The final rule includes a disturbing provision that seems to give USCIS and consular officials the power to determine that a sponsor has not satisfied the financial requirements, even if he or she appears to pass the income or assets tests.

Consular and USCIS officials may reject an affidavit of support whose projected income meets the financial requirements, but only if, based on specific facts, it is “reasonable to infer that the sponsor will not be able to maintain his or her household income” at the necessary level.¹²⁵ In addition, even when the affidavit of support is found to be sufficient, the intending immigrant may be found inadmissible under INA §212(a)(4) as likely to become a public charge if “specific facts” support such a “reasonable inference.”¹²⁶

Termination of the Contract

The liability of the sponsor executing the affidavit of support form terminates only when the sponsored immigrant:¹²⁷

- Becomes a U.S. citizen;
- Earns or is credited with a total of 40 qualifying quarters, as defined by Social Security law;
- Dies;
- Loses or abandons LPR status and departs from the United States; or

¹²³ *Id.*

¹²⁴ INS Fact Sheet, “Affidavit of Support, Form I-864” (Oct. 20, 1997).

¹²⁵ 8 CFR §213a.2(c)(2)(ii)(C).

¹²⁶ 8 CFR §213a.2(c)(2)(iv).

¹²⁷ 8 CFR §213a.2(e)(2)(i).

- Is ordered removed but readjusts status in immigration proceedings through submission of a new Form I-864.

The statute allows termination of the contract on the sponsor's death.¹²⁸ However, future liability of the sponsor's estate for actions brought by the sponsored immigrant or agencies seeking reimbursement likely will be a matter of state law interpretation. In any event, the regulations provide that the sponsor's estate is not relieved from liability for any reimbursement obligation that accrued before the sponsor's death.¹²⁹

Abandonment or loss of LPR status can occur through affirmative misconduct or departure from the United States. Misconduct could include the commission of crimes, fraud, or other miscellaneous acts. Abandonment through departure depends on the length of time the LPR has been absent from the United States and his or her intention as to whether the absence is temporary.

Note that a divorce will not nullify the sponsorship agreement. Thus, a spouse who sponsors an immigrant will remain liable under the affidavit until one of the conditions listed above occurs. This may result in a particular hardship for battered spouses, who might otherwise be inclined to divorce the abusing spouse. Divorce cuts off the ability of the sponsor to credit his or her qualifying quarters to the sponsored immigrant and thus terminate the contract sooner.

There is at least one other possible way for the sponsor to be relieved of further liability, and that is through discharge in bankruptcy. The general rule is that all debts, unless specifically excepted by federal statute, are dischargeable in bankruptcy. The exceptions provision of the bankruptcy code does not appear to prohibit the discharge of the types of debts envisioned by the affidavit of support process.

It is significant to note that there is no requirement that the sponsored immigrant, or any federal agency, notify the sponsor when any of the above conditions have been satisfied. In other words, there appears to be no easy way for the sponsor to learn when his or her obligations or liability under the Form I-864 have ended. Information regarding the sponsored immigrant's, or his or her spouse's or parent's, earnings record on file with the Social Security Administration is protected by the federal Privacy Act.¹³⁰ Comparable information regarding the sponsored immigrant's eligibility for, or obtaining, naturalization similarly may be blocked. Although USCIS will provide automated information to agencies and entities that will facilitate their enforcing the sponsor's obligation to reimburse the cost of means-tested programs, there is no equivalent exchange of information to a sponsor defending against those actions or maintenance actions brought by the sponsored immigrant.

The sponsor's or household member's contractual obligations under the affidavit of support do not begin until the intending immigrant obtains LPR status. The affida-

¹²⁸ 8 CFR §213a.2(e)(2)(ii).

¹²⁹ 8 CFR §213a.2(e)(3).

¹³⁰ 5 USC §552a.

vit is not binding upon execution and submission. Therefore, the sponsor or household member may withdraw the affidavit at any point before the intending immigrant is granted LPR status based on the submission of the affidavit of support.¹³¹

Change of Address

Sponsors who change their address have a continuing obligation to inform USCIS and the state where the sponsored immigrant is residing within 30 days of the address change.¹³² Those who do not are subject to stiff civil fines. Only persons who execute the Form I-864 are required to file the change of address form—not those who execute the Form I-864A. Potential fines range from \$250 to \$2,000 for the first failure to report; if the failure is with knowledge that the sponsored immigrant has received a means-tested program, then the fines increase to between \$2,000 and \$5,000.¹³³

USCIS has created a form specifically for this purpose: Form I-865, Sponsor's Notice of Change of Address.¹³⁴ The sponsor completes the one-page form and mails it to the appropriate USCIS service center that has jurisdiction over the sponsor's new address.

Where to File

If the visa applicant is applying for adjustment of status, the Form I-864 and supporting documents are filed with the Form I-485. If the applicant is consular processing, the I-864 is filed by the sponsor with the National Visa Center (NVC) as part of the documentary and form submission process. The NVC mails the I-864 forms directly to the petitioner/sponsor, rather than to the visa applicant, and instructs the sponsor where and when to file the completed form. A \$85 fee is charged at time of submission. The NVC will do a technical review of the completed form and supporting documents—not a determination of whether the 125 percent requirement is satisfied—and forward them to the consulate if they satisfy the requirements.

There is no separate filing fee for the Form I-864, unless the sponsor is submitting it to the NVC. In that case, the sponsor must pay a \$85 filing fee for each Form I-864 that is being submitted. The Form I-864 is now an official part of the packet of forms that must be included with the adjustment of status or consular processing application.

¹³¹ 8 CFR §§213a.2(e), (f).

¹³² INA §213A(d)(1); 8 CFR §213a.3(a)(1).

¹³³ INA §213A(d)(2).

¹³⁴ *See* 8 CFR §213a.3(a)(1).